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Delta Drinking Water Council
CALFED Bay-Delta Program

RE: Open Meeting Act Requirements

Dear Members:

As a subcommittee to the Bay-Delta Advisory Council ("BDAC"), the Delta Drinking Water Council (or "Council") is subject to the same open meeting rules that apply to BDAC. This letter summarizes some of the provisions of the State Bagley-Keene Open Meeting Act and how the Act applies to meetings of the newly-established Council. (Cal. Gov. Code § 11120, *et seq.*) It also briefly summarizes some of the provisions of the Federal Advisory Committee Act "(FACA)" that govern the notice and conduct of the Council's meetings. (5 U.S.C. App. 2, § 1 *et seq.*)

Purpose and Scope of Bagley-Keene Act

The purpose of the Bagley-Keene Act is to assure that virtually all aspects of the decision-making process by a multi-member state body are conducted in public. The Act represents the Legislature's determination that the balance between public access to the activities of a public body and the need for secret, candor, debate, and information-gathering should generally be struck in favor of public access. The law has been interpreted by courts to mean that all of the deliberative processes by multi-member bodies, including discussion, debate and the acquisition of information, must be open and available for public scrutiny. Unless a specific statutory or court-made exception authorizing a closed session can be found, the matter must be conducted in public regardless of its sensitivity.

To Whom Does the Act Apply?

The Bagley-Keene Act applies to multi-member state bodies which are required by law to meet or which are created by executive order. It also applies to advisory bodies created by formal action by state entities, if the advisory body consists of three or more persons. The Act does not

apply to individual decision-makers who are not members of boards or commissions. For example, agency or department heads who meet with advisors, staff, or anyone else are not covered by the requirements of the Act. Nor would the Act apply to members of the Delta Drinking Water Council who meet with third parties in a capacity separate from their membership on the Council.

What is a meeting?

In general, a meeting is defined as any gathering, formal or informal, of a quorum of the body at which information about the business of the body is received, discussed or voted upon. Meals, seminars, conferences, and serial communications may be included. (42 Ops. Cal. Atty. Gen. 61 (1963); 61 Ops. Cal. Atty. Gen. 220 (1978).) In order to satisfy these provisions of the Act, a number of concepts should be kept in mind.

First, if communications to the body or among members of the body are part of the deliberative or information-acquisition process, the public normally has a right to be involved. Unless specifically exempted, the public has a right to witness the process by which the board acquires information, observe its deliberations on a decision, and see the information upon which the board's decision is based.

Second, if a quorum of a body ultimately receives information relevant to its purview, or participates in a deliberation, directly or indirectly, a meeting has generally occurred. Third, serial or rotating meetings through a series of telephone calls or other communications by which a quorum of the council becomes involved in the information-acquisition or deliberative process are prohibited unless the notice and public access provisions of the Act have been satisfied. Finally, the Act limits application of the less-than-a-quorum exception to advisory committees by providing that all advisory committees of three members or more are covered by the open meeting provisions.

Notice and Agenda Requirements

The Act requires decision-making and advisory bodies such as the Delta Drinking Water Council to provide written notice of the time, date, location and agenda for meetings at least 10 days before the meeting to all who request the information. The notice for an advisory committee need not provide the same level of detail as is required for decision-making bodies, but should include a brief, general description of the business to be transacted or discussed. Notice of a meeting of BDAC may also constitute notice of meetings of subcommittees of BDAC, such as the Council, so long as the specific time and place of the subcommittee's meeting is announced

during BDAC's public meeting, and the subcommittee's meeting is conducted within a reasonable time of, and nearby, the meeting of BDAC as a whole.

The Public's Rights While Attending Meetings

A member of the public may attend a meeting of the Council or other state body without having to register or give other information as a condition of attendance. Any sign-in sheet must clearly state that completion of the document is voluntary. A member of the public may tape record a meeting, unless the recording would cause a disruption of the proceedings. A member of the public, however, may be excluded from a meeting if he or she is clearly and persistently disruptive.

A member of the public has the right to directly address the state body on each agenda item before or during the discussion or consideration of the item. The Council may set reasonable limits on the total amount of time allocated for public comment on particular issues and for each individual speaker.

Penalties and Remedies for Violation of the Act

Criminal penalties, civil injunctive relief and the award of attorneys' fees are provided to assist enforcement of the Act. In addition, most actions taken in violation of the Act may be declared null and void by a reviewing court.

The Federal Advisory Committee Act

FACA is intended by the U.S. Congress to control the advisory committee process and to open to public scrutiny the manner in which private individuals and groups advise federally-sponsored public agencies. FACA defines advisory committees to include any "committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" established by law, the President, or a federal agency.

Under FACA, all advisory committee meetings are public. Members of the public have the right to attend, appear before, or file statements with an advisory committee, subject to reasonable rules prescribed by the Administrator of the U.S. Department of General Services. Records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents given to an advisory committee are to be available for public inspection. There are additional reporting, accounting, and federal agency coordinating requirements spelled out in the provisions of FACA.

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FACA requires an advisory committee such as the Council to publish a notice including the meeting's purpose, time, location, agenda, and any exemptions to the federal Freedom of Information Act (5 U.S.C. § 552 (B)). The notice must be published in the Federal Register at least 15 calendar days in advance of the meeting.

Members of the Delta Drinking Water Council or staff may in the future have questions about the application of the Bagley-Keene Act or FACA which are not specifically addressed either in this memorandum or the accompanying materials. You should feel free to direct any such questions to me.

Sincerely,



MARIAN E. MOE
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: Paul Hutton
Judy Heath

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